No. 95-2074

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

—versus—

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

—and—

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF MEMBERS OF THE VIRGINIA HOUSE OF DELEGATES AND THE VIRGINIA SENATE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici Curiae are twenty-three members of the Virginia House of Delegates and seven members of the Virginia Senate. Members of the Virginia House of Delegates are Kenneth R. Plum, Harvey B. Morgan, Harry J. Parrish, Mitchell Van Yahres, Marian Van Landingham, James M. Scott, W. Tayloe Murphy, R. Steven Landes, Julia

A. Connally, L. Karen Darner, Glenn M. Weatherholtz, George H. Heilig, Jr., Franklin P. Hall, James F. Almand, Linda T. Puller, John H. Tate, Jr., Vincent F. Callahan, Jr., James H. Dillard II, Leo C. Wardrup, Alan A. Diamonstein, Frank M. Ruff, Eric I. Cantor, Thomas M. Jackson, Jr., and John J. "Butch" Davies. Members of the Virginia Senate are W. Roscoe Reynolds, R. Edward Houck, Patricia S. Ticer, Emmett W. Hanger, Jr., Joseph V. Gartlan, Jr., Janet D. Howell, and Frederick M. Quayle.

The Commonwealth of Virginia has long been committed to ensuring religious freedom of its citizens. Since the founding of the Republic, Virginia's commitment to and experiment in freedom of religious exercise has played an important role in this nation's commitment to religious freedom. In his *Notes on the State of Virginia*, Thomas Jefferson wrote of the beneficial effects on the republic created by the flourishing of numerous creeds:

> Difference of opinion is advantageous in religion. The several sects perform the office of a Censor morum over each other. Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity. What has been the effect of coercion? To make one half the world fools, and the other half hypocrites.

Thomas Jefferson, *Notes on the State of Virginia, in The Portable Thomas Jefferson* 212 (Merrill D. Peterson ed., 1975). In furtherance of its commitment to religious freedom, the General Assembly of Virginia was among the first in the Union to enact in 1786 "A Bill for Establishing

Religious Freedom." *See The Portable Thomas Jefferson, supra,* at 251-253.

As legislators of the Commonwealth of Virginia, *amici curiae* are committed to upholding Virginia's commitment to religious free exercise and at the same time are vitally concerned with preserving state legislative prerogative to enact laws of general applicability without undue interference from Congress or the judiciary. Determination by the Court of the issues presented in this case -- especially whether Congress, in enacting the Religious Freedom Restoration Act of 1993 ("RFRA or the "Act"), acted within its constitutional and legislative power in creating a right of action for courts to review state legislative enactments based on claims that such enactments substantially burden religious free exercise -- thus involves balancing of interests that are of great importance to *amici*.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act of 1993 ("RFRA" or the "Act") achieves the aim of preserving freedom of religious exercise without unduly constraining state legislative processes. Indeed, RFRA vitally supports state legislatures in enacting statutes of general applicability by ensuring that such statutes will be reviewed by those institutions -- courts -- that are best suited to craft exemptions to such laws where necessary to further legitimate religious exercise.

State legislatures are ill-equipped and incapable of prospectively crafting exemptions to generally applicable statutes that take account of all religious practices that inadvertently may be unduly restricted. Although subsequent legislative amendment of general laws is possible, claims that generally applicable statutes may substantially burden

religious freedom are best reviewed by courts rather than by legislatures. Such claims require determination of the sincerity of religious beliefs, which often involves credibility determinations uniquely well suited for the judicial task; exemptions to general laws based on religious practice are better and more efficiently crafted in the context of case-by-case adjudications based on developed factual records, which is the essence of the judicial function; and courts, through their adherence to historical precedent, are uniquely well situated to mitigate in a principled fashion against the unforeseen and unintended harsh consequences of laws which must be written in general terms.

Thus far from infringing on state legislative processes or the prerogatives of state legislators, *amici* believe that RFRA supports them. RFRA enables *amici* to do their jobs of legislating generally without undertaking the ill-conceived and futile task of attempting prospectively to evaluate the effect of general laws on every known religious practice or to make the kinds of credibility determinations concerning the sincerity of religious belief that courts are best equipped to make. By creating a right of judicial review, RFRA helps ensure that legislative enactments will not result in unintended and unremedied burdens on religious exercise, and places the responsibility for crafting necessary exemptions to accommodate free exercise claims on courts, which are institutionally better situated than legislatures in performing this function.

ARGUMENT

RFRA SUPPORTS STATE LEGISLATORS AND ENHANCES STATE LEGISLATIVE PROCESSES BY ENSURING THE ROLE OF JUDICIAL INSTITUTIONS IN CRAFTING NECESSARY EXEMPTIONS TO STATUTES OF GENERAL APPLICABILITY TO PROTECT RELIGIOUS FREEDOM

The Religious Freedom Restoration Act of 1993 creates a private right of action "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). The Act expressly "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). As such, RFRA provides an avenue for judicial review of state and federal statutes, including those of general applicability, that may substantially burden religious exercise even if they do not run afoul of the First Amendment.

The right of action created by RFRA is necessary to protect the fundamental value of religious free exercise. The nature of the legislative process is such that in drafting and enacting laws, legislatures must inevitably paint with a broad brush. "The limitations on [the legislature's] ability to foresee or consider particular problems that may in the future arise under a statutory scheme often require that legislation be drafted by reference to general categories rather than to specific classes of activities within those categories." *Natural Resources Defense Council, Inc. v. U.S. EPA*, 725 F.2d 761, 770 (D.C. Cir. 1984).

Such generally written laws, although achieving the purpose of reaching broad variations in conduct, often have the accompanying and unforeseen consequence of also

reaching conduct not intended to be covered by the enactment. This is because the nature of legislation is prospective, and lawmakers cannot *a priori* anticipate and consider all possible consequences of their enactments and specify necessary exemptions. As Judge Learned Hand remarked over a half-century ago: "[E]ven if the law had language of its own, it could not provide for all situations which might come up. Nobody is so gifted with foresight that he can divine all possible human events in advance and prescribe the proper rule for each." Learned Hand, How Far Is A Judge Free In Rendering A Decision? *in The Spirit of Liberty: Papers and Addresses of Learned Hand* 105 (Irving Dilliard ed., 1974).

The hazards of legislating with general and potentially overbroad strokes are particularly acute when such general laws burden fundamental values such as freedom of religious exercise. Congress recognized as much when it enacted RFRA. Throughout the legislative debates surrounding enactment of RFRA are numerous references to unacceptable burdens on religious free exercise imposed by laws of general applicability. *E.g.*, 139 Cong. Rec. S14353 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (criticizing neutral Minnesota state law that allowed removal of children from parents' homes due to parents' religiously motivated actions and Michigan state officials' performance of autopsy despite father's religious objections).

In order to mitigate harsh and unintended-for consequences of broad language, the need thus arises for exemptions to be formulated as general legislation is applied in particular cases or circumstances. This Court recognized this abiding truth over a century ago:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to

> injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. . . . The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit."

Holy Trinity Church v. United States, 143 U.S. 457, 461 (1892) (quoting *United States v. Kirby*, 74 U.S. 482, 486-487 (1868)); *see also e.g., Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980) ("The doctrine of fair use [in copyright law], originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.").

Although subsequent legislative amendments could result in statutorily enacted exemptions designed to mitigate the unforeseen and harsh consequences of generally applicable laws, judicial institutions are better equipped to engage in this task of crafting exemptions for several independent reasons.

First, the process of exempting particular conduct from generally applicable laws is better done through case-by-case adjudication in which a factual record is developed. "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular

discussions and adjudications." James Madison, Federalist No. 37, *in The Federalist Papers* 229 (Clinton Rossiter ed., 1961).

Reasoning has a role to play in the development and evolution of the law, "[b]ut as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent." Benjamin N. Cardozo, *The Nature of the Judicial Process* 35 (1921). *See also e.g., Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980) ("The cases emphasize that resolution of a fair use claim 'depends on an examination of the facts in each case [and] cannot be determined by resort to any arbitrary rules or fixed criteria.'" (citation omitted)).

Because the task for case-by-case adjudication is one for the courts, those institutions are better equipped than are legislatures in formulating exemptions to general statutes.

Second, courts rather than legislatures are uniquely well situated to make the kind of credibility determinations that are often involved in determining whether exemptions to general laws should be formulated. This is particularly true in the context of religious free exercise claims. Such claims inherently involve consideration of the sincerity of religious belief, and the importance of such belief to one's practice of religion.

In a recent case in the Commonwealth of Virginia involving claims under RFRA, for example, the district court granted preliminary relief in favor of plaintiffs who argued that application to their Meal Ministry of a section of the Richmond City Ordinance, which limited the frequency and volume of the provision of services to the homeless, violated their rights to free exercise as protected by the First

Amendment and RFRA. *See Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia*, __ F. Supp. __, 1996 WL 685755 (E.D. Va. Nov. 26, 1996). The court based its holding in part on its conclusion that "[p]laintiffs have made a strong showing that feeding the poor constitutes a central tenet of the religion practiced at the six churches involved in the Meal Ministry." *Id.* at *11.

Such credibility determinations concerning the sincerity of religious belief form the basis of religious free exercise claims. Because courts regularly engage in such determinations of credibility and are institutionally better suited to make such determinations within a particular factual context, providing a right to obtain judicial review promotes the process of formulating well-crafted exemptions to general legislation.

Third, courts, through their adherence and commitment to observing historical precedent, are uniquely well situated to mitigate in a principled fashion against the unforeseen and unintended harsh consequences of laws which must be written in general terms. As Judge Learned Hand observed, tolerance for minority faiths in this country is best preserved and enhanced through mindfulness of the lessons of humility and evanescence contained in the historical record. Through knowledge and application of the lessons of history, "the political life of a country like ours would get depth and steadiness, would tend to escape its greatest danger, which is the disposition to take the immediate for the eternal, to press the advantage of present numbers to the full, to ignore dissenters and regard them as heretics, by some adumbration of what men have thought and felt in other times and at other places." Learned Hand, Sources of Tolerance, *in The Spirit of Liberty: Papers and Addresses of Learned Hand* 80 (Irving Dilliard ed., 1974).

Courts, when crafting exemptions to general laws, are mindful of history and are trained to proceed in a principled fashion. "[R]estrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe [a judge's] action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law." Benjamin N. Cardozo, *The Nature of the Judicial Process* 114 (1921).

Rather than reacting to well-organized minority religions, courts may thus be better able to resist political pressure in determining whether exemptions to general laws are warranted. *See generally* H.R. Rep. No. 88, 103d Cong., 1st Sess. at 6 (1993) ("It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute."); S. Rep. No. 111, 103d Cong., 1st Sess. at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892 ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right.").

By creating a right of action against legislative enactments, RFRA thus promotes rather than constrains state legislative processes. RFRA achieves this result by helping to ensure that legislative enactments will not result in unintended and unremedied burdens on religious exercise, and by placing the responsibility for crafting necessary exemptions to accommodate free exercise claims on courts, which are institutionally better situated than legislatures in performing this function.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully urge the Court to affirm the decision of the Court of Appeals for the Fifth Circuit upholding the Religious Freedom Restoration Act.

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